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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RONALD RICHARD AANERUD, PAUL VINCENT MORINVILLE, AND RHONDA RAE MORINVILLE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for Petitioners

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QUESTIONS PRESENTED

1. Whether the criminal prosecution of Petitioners for not possessing a special permit for a Waterfowl Production Area constitutes selective prosecution and a violation of equal protection implicit in the Fifth Amendment, when local United States Fish and Wildlife Service policy not to issue permits to anyone other than American Indians is routinely disregarded by enforcement officials who do not require permits of American Indians in the same Area, contrary to the "prohibited except by special permit" plain language of the regulation.

2. Whether the criminal prosecution of Petitioners for not possessing a special permit for a Waterfowl Production Area constitutes a violation

of equal protection implicit in the Fifth Amendment, when an informal, unwritten, local policy of the United States Fish and Wildlife Service recognizes as "historic treaty rights", a trapping practice unknown until fifteen years ago, that could not have played any role in historic hunting and fishing, within the original boundaries of an Indian reservation expressly created only for agricultural purposes by an 1867 treaty that contains no reference to hunting and fishing rights, on land which for half a century was in private ownership when acquired in 1965 by the United States for a Waterfowl Production Area, and when that historic treaty right is conceded to be counterproductive to the very purpose for which the Waterfowl Production Area was created.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the district court is unreported (Pet. App. 26a). The

decision of the court of appeals is reported at 893 F.2d 956 (Pet. App. 1a).

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1990 (Pet. App. 39a). On February 16, the court of appeals denied a timely petition for rehearing (Pet. App. 25a). On May 8, 1990, Justice Blackmun extended the time for filing a petition for writ of certiorari to and including June 18, 1990 (Pet. App. 43a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Fifth Amendment, United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. §2.

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, is punishable as a principal.

3. 50 C.F.R. § 27.51.

Disturbing, injuring, and damaging plants and animals.

(a) Disturbing, injuring, spearing, poisoning, destroying, collecting or attempting to disturb, injure, spear, poison, destroy or collect any plant or animal on any national wildlife refuge is prohibited except by special permit unless otherwise permitted under this Subchapter C.

STATEMENT

Within the last twenty (20) years, a relatively novel fish bait industry has developed in Northern Minnesota. The

industry is commonly called "Leeching". Leeches are trapped by a simple process of putting leech bait in a small, weighted plastic bag attached to a float, dropping it into the water, and later recovering the bag full of leeches. Fish like leeches and the commercial demand for leeches as fish bait provides supplemental income for a number of local people and businesses. Unhappily, the leeching industry precipitated a problem.

Leeching is not compatible with waterfowl production, but this is not the reason for this litigation. The United States and Petitioners agree that:

> leech trapping is not compatible with waterfowl production goals because it disturbs nesting waterfowl and their broods, reduces populations of invertebrates consumed by waterfowl, and attracts

> and concentrates predators which are drawn to discarded bait and nontarget catches.

(Pet. App. 8a, n.7). Petitioners support waterfowl production and a complete ban on leech trapping in Waterfowl Production Areas. The United States agrees, but with one exception, and hence the problem. American Indians within Indian Reservations are allowed to trap leeches in these Areas.

The basis for this exception, according to the United States, is the "historic treaty right" of the American Indians to trap leeches. As a result, the United States by some informal, unwritten, local communication agreed to allow, with a permit, American Indians to trap leeches in the Krebsbach and Borgrund Waterfowl Production Areas in Mahnomen County, Minnesota. In day to

day practice, however, the United States completely ignored the permit requirement for American Indians, never enforced it, never cited an American Indian, and thus sanctioned an unlimited number of violations of the local permit policy in express disregard of the plain language of the applicable C.F.R. regulation ("prohibited except by special permit").

At the same time, the United States pursued and arrested, with all due diligence, non-Indians who did not have a permit.

With each passing year, the acquisition of additional areas for waterfowl production promises to substantially transform the entire region in question into a checkerboard area in which only American Indians have special rights substantially different

from those of other residents (more than just trapping leeches). The special rights in this instance cannot be traced to any definite treaty or statute (not with respect to hunting and fishing and certainly not with respect to the heretofore unknown practice of trapping leeches). In this light, and without advice of counsel, Petitioners protested and sought to challenge the enforcement practice and position of the United States.

On May 29, 1987, Petitioners were issued citations by the United States Fish and Wildlife Service for taking leeches without permits within the Krebsbach and Borgrund Waterfowl Production Areas. These acts were alleged to be in violation of 18 U.S.C. § 2 and 50 C.F.R. § 27.51. The area in

question is within the original boundaries of the White Earth Indian Reservation.

Petitioners made their initial appearances and thereafter on February 15, 1988, made a motion to dismiss the charges for the reason that they were being selectively prosecuted and deprived of equal protection of the laws in violation of the Fifth Amendment. Pet. App. 2a. This argument revolved around the fact that while Indians without permits were allowed to take leeches, Petitioners, who are non-Indians, were being prosecuted for the same thing. In fact, Petitioners specifically sought this prosecution.

The general status of the original White Earth Reservation has been the subject of extended litigation, not yet

authoritatively resolved by this Court. See, State v. Clark, 282 N.W.2d 902 (Minn. 1979) cert. denied, 445 U.S. 904 (1980), and White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1128 (1982) cert. denied, 103 S.Ct. 489 (1982). The White Earth Reservation, as established by the Treaty of March 19, 1867 (16 Stat. 719), consisted of thirty-six townships or approximately 854,740 acres. In 1889, title to the lands of this reservation not necessary for allotments, essentially four townships, was ceded by the White Earth Indians to the United States under the Act of January 14, 1880, (25 Stat. 642) - commonly known as the Nelson act. See, e.g., Department of the Interior - Office of Indian Affairs, General Data Concerning Indian Reservations at 6

(1929); Chippewa Indians of Minnesota v. United States, 90 Ct.Cl. 140, 143 (1940). Of the lands allotted, approximately 645,000 acres eventually passed out of trust status. At present, over seventy percent (70%) of the population within the 1867 Reservation is non-Indian and substantially more than fifty percent (50%) of that area is non-Indian owned.

The specific land involved here was initially allotted in trust by the United States to a tribal member in 1907 for her "sole use and benefit" pursuant to a specific Act of Congress (In 1889, Congress enacted the Nelson act, 25 Stat. 642, I Kappler 301, one of a series of particularized allotment acts adopted after passage of the Dawes or General Allotment Act of 1887, 24 Stat.

388. I Kappler 33). At that point in time, all aboriginal or other treaty rights of other members of the White Earth Band of Chippewa Indians were therefore extinguished by Congress and ceased to exist insofar as this particular property is concerned. In 1920, by Order of the Secretary of the Interior, deposited in the General Land Office, a Fee Simple Patent was issued to this tribal member by President Woodrow Wilson. For nearly half a century thereafter, until 1965, this property was, by subsequent conveyances, owned by non-members in fee simple, free and clear of all encumbrances.

In 1965, the United States purchased this property with Federal Duck Stamp dollars. The 1965 conveyance to the United States recites that it is subject

only to "rules and regulations as may be prescribed by the Secretary of Interior governing the use, occupation, protection, and administration of waterfowl production areas under and in compliance with the 1934 Act".

In rejecting Petitioners' equal protection arguments, the district court simply described this property as "reservation land" and concluded that since the United States Fish and Wildlife service locally recognized the activity of leech trapping as part of the "historic treaty rights" held by the White Earth Band, the selective prosecution of Petitioners was permissible. The court did not address the failure of the Wildlife Service to adhere to its paper policy of requiring permits of American Indians, nor did it

mention that such a failure was contrary to the plain language of 50 C.F.R. 27.51. As a result, the motion to dismiss was denied in a memorandum opinion dated April 12, 1988. Pet. App. 26a. Thereafter, on August 10, 1988, Petitioners entered a plea of guilty before Judge Donald Alsop, with the understanding pursuant to Rule 11(a) of the Federal Rules of Criminal Procedure, they could appeal the issues raised in their motion to dismiss to the court of appeals. The district court entertained jurisdiction pursuant to 18 U.S.C. 3231. After the plea of guilty, Petitioners were sentenced to fines from $250 to $50, special assessments, and suspended jail sentences ranging from 6 months to 3 months. Notice of appeal was filed on August 23, 1988, pursuant

to Rule 4(b) of the Federal Rules of Appellate procedure.

On appeal, a panel of the Eighth Circuit affirmed. Judge John R. Gibson, who wrote the panel's opinion, stated that:

> It is well-settled that the Treaty of 1867, even though it relates specifically to agricultural pursuits and makes no express reference to hunting and fishing rights, reestablished the Minnesota Chippewa's aboriginal rights of hunting, fishing, and collecting rice, which had been extinguished by the Treaty of February 25, 1855, 10 Stat. 1165 (February 25, 1855).

Pet. App. 5a.

As in the district court, the history of the specific land in question and the manner in which these aboriginal rights were presumed to survive extinguishment were not addressed. For the first time, however, the opinion did acknowledge that the only substantiation the United States could muster in support of the

application of the exemption to American Indians in this specific instance was the oral assurance of the Assistant United States Attorney during oral argument that it was "created by an executive branch decision which was based on the Chippewa's historic treaty rights". Pet. App. 9a. While it is still unclear who made this executive branch decision or when it was made, there is no question that the only written substantiation here is dated subsequent to the prosecution of Petitioners. Moreover, the court rejected Petitioners' argument regarding the the day to day disregard of the rules of the Wildlife Service, by the Wildlife service itself, by simply noting that the permit requirement was probably contrary to "treaty rights" in any event. Pet. App. 18a-19a.

In this light, the court of appeals also concurred with the district court that Petitioners failed to make a threshold showing of either of the elements necessary for a selective prosecution defense. As a result, the court held that the district court did not err in its failure to grant an evidentiary hearing or discovery.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

Petitioners recognize that under specific treaties and statutes and in certain circumstances, American Indians possess special rights distinct from other American citizens. However, nothing in the law or the facts specifically applicable to this case substantiates the existence of any special American Indian rights so as to justify the selective prosecution of

Petitioners. What is present in both the law and the facts clearly supports the position of Petitioners. See, petitions for certiorari in State of Minnesota v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980) and White Earth Band of Chippewa Indians v. Alexander, 518 F.Supp. 527 (D. Minn. 1987), aff'd, 683 F.2d 1129 (8th Cir.), cert. denied, 459 U.S. 1070 (1982). Also see generally, State v. Keezer, 292 N.W.2d 714 (Minn. 1980).

B. THE POLICY OF THE UNITED STATES FISH AND WILDLIFE SERVICE IN PERMITTING INDIANS TO TAKE LEECHES WITHOUT PERMITS WHILE PROSECUTING NON-INDIANS VIOLATES EQUAL PROTECTION OF THE LAWS AND CONSTITUTES SELECTIVE CRIMINAL PROSECUTION.

It is undisputed in this case that Indians are allowed to take leeches

without permits, while non-Indians are arrested and charged with a crime. Moreover, here Indians could be routinely issued permits. See generally United States v. Dion, 476 U.S. 734 (1986). In fact, Indians are allowed to take leeches in the same Waterfowl Production Area where Petitioners were arrested, even though they, the same as Petitioners, have no permits. Since Petitioners are in the same position as Indians, who have no permits, but are allowed to take leeches, they cannot, under the law, be prosecuted. To do so violates equal protection of the laws and constitutes selective prosecution.

Equal protection of the law necessarily and by strong and venerable precedent extends to the application and enforcement of laws. Yick Wo v. Hopkins, 118, U.S. 356, 373-374 (1886).

No Defendant can be convicted if there is unconstitutional discrimination in the adminstration of a penal statute. E.g., Two Guys from Harrison v. McGinley, 366 U.S. 582, 588 (1961); U.S. v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972). Any criminal prosecution must be undertaken in good faith and in a non-discriminatory fashion. U.S. v. Falk, 479 F.2d 616, 620 (7th Cir. 1963).

The elements of the defense, based upon selective prosecution, are: (1) a demonstration that Defendant has been singled out for prosecution while other similarly situated have not been prosecuted for similar conduct, and (2) a showing that the government's discriminatory selection is based on an impermissible ground such as race, religion, or exercise of First Amendment rights. U.S. v. Catlett, 584 F.2d 864,

866 (8th Cir. 1978); U.S. v. Ojala, 544 F.2d 940, 943 (8th Cir. 1975); U.S. v. Martin, 557 F.Supp. 681, 687-688 (N.D., IA. 1982). Circuits other than the Eighth Circuit follow the same standard. E.g., U.S. v. Christopher, 700 F.2d 1253, 1258 (9th Cir. 1983); U.S. v. Myers, 692 F.2d 823, 825 (2nd Cir. 1982).

A hearing is required and discovery permitted on the issue of selective prosecution if "there is evidence to show the existence of the essential elements of the defense and the documents would indeed be probative of the elements." U.S. v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976). A hearing is required, moreover, when the motion alleges sufficient facts that take the question past the frivolous

state, U.S. v. Erne, 576 F.2d 212 (9th Cir. 1978), and raises a reasonable doubt as to the prosecutor's purpose. U.S. v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975). Most of the above was recognized by the Eighth Circuit in U.S. v. Catlett, 584 F.2d 864 (8th Cir. 1978), but substantially ignored here.

Hearings on selective prosecution issues frequently are held. For example, in Cammisano, supra, the lower court dismissed the action because the government failed to answer discovery questions bearing on the defense. A hearing was held at the lower court level to delve into the facts of the defense. The Eighth Circuit reversed the dismissal and remanded so that the government would be given the opportunity to respond to the discovery

requests. In U.S. v. Steele, supra, bill of particulars were propounded and answered on other offenses that had been committed but not prosecuted and, in addition, the Court delved extensively into the government's files in determining the motion. See also U.S. v. Catlett, supra, at 967 (8th Cir. 1978).

There is no dispute in this case that while the Fish and Wildlife Service prosecutes non-Indians for taking leeches without a permit, Indians are permitted to take leeches even though they have no permits. Certainly both the Indian and non-Indian are in similar situations. Both are required to have permits. Be that as it may, Indians are not prosecuted while non-Indians are prosecuted.

The only rationale for the government's policy is that Indians purportedly have some inherent treaty right to take leeches. However, even assuming arguendo that such treaty right exists, which Petitioners deny, Indians are still required to have a permit to take leeches. Stripped to its bones, then, the government's policy rests solely on racial grounds--Indians do not have to possess permits even though available and required, while non-Indians are arrested for not having such permits.

The memorandum decision of the trial court did not address the thrust of Petitioners' argument, i.e., assuming, but not agreeing, that Indians have a treaty right to take leeches, but only after securing permits which would be

freely given, non-Indians are being selectively prosecuted and denied equal protection when they are prosecuted for taking leeches without permits when Indians go unprosecuted for taking leeches without required permits. The trial court, in denying the motion to dismiss for selective prosecution, simply concluded that the government could refuse to prosecute Indians because of their unique status. It failed to recognize or even address the situation at hand, i.e., that Indians were required to have permits which would be freely given, but were not prosecuted when they took leeches without the required permits. Although Indians may have a treaty right to take leeches, they still should be required to secure permits. Petitioners' argument goes beyond the assumption that

Indians have treaty rights to hunt and fish. Indians are regularly not prosecuted for taking leeches without the required permits (which they can secure) while non-Indians are prosecuted for taking leeches without permits (which are not given to non-Indians). Both Indians and non-Indians violate the law when they take leeches without permits, but the non-Indians get prosecuted and the Indians do not.

Moreover, the population of the original White Earth Reservation is not uncharacteristic of Indian reservations today. In addition to non-Indians, a substantial number of non-member Indians live there who do not even arguably have treaty rights in the area in question. See generally, Duro v. Reina, No. 88-6546, decided May 29, 1990. In the

absence of actually requiring permits of White Earth Indians who arguably might have treaty rights within the original White Earth Reservation, the United States has not and can not base its present policy on any grounds other than race. And the general acknowledgment by the court of appeals that the treaty rights are limited to members of the White Earth Band of Chippewa Indians does nothing to cure the discriminatory effect of this practice which continues today. Pet. App. 5a-6a.

In the case at hand, since the government's action rests on racial grounds, a suspect classification, judicial review under the equal protection clause requires active and critical analysis. Under the strict

standard applied in such cases, the government bears the additional burden of establishing that it has a compelling interest that justifies the law. E.g., Shapiro v. Thompson, 394 U.S. 618 (1969).

The only conclusion that can be reached is that Petitioners are the victims of a prosecution policy that is selective and unconstitutional on equal protection grounds. The Fifth Amendment prohibits such policy and the charges against Petitioners must be dismissed or this case remanded for a full hearing on the selective prosecution issue.

C. THE POLICY OF THE UNITED STATES FISH AND WILDLIFE SERVICE PERMITTING INDIANS BUT NOT NON-INDIANS TO TAKE LEECHES VIOLATES EQUAL PROTECTION OF THE LAWS AS REQUIRED BY THE FIFTH AMENDMENT.

While this Court has sanctioned the policy of singling out Indians as a class, E.g., Washington v. Fishing Vessell Association, 443 U.S. 658 (1979); Moe v. Confederated Salish & Kootenai Tribes, U.S. 463 (1976); Fisher v. District Court, 424 U.S. 382 (1976), laws and policy that are based on Indian versus non-Indian classifications are subject to equal protection review. The Court has held that classifications involving Indians are valid if they "can be tied rationally to the fulfillment of Congress' unique obligation toward Indians". Morton v. Mancari, 417 U.S. 535, 555 (1974). In Morton, the Court's opinion, for example, referred to the possibility of an exemption for Indians from all civil service examinations "as an obviously more difficult question". 417 U.S. 535 (1974).

In the present case, the trapping of leeches for bait has been in existence for only the past fifteen (15) years or so. It is a relatively recent phenomenon. As a result, the United States Fish and Wildlife Service cannot argue that leeches have played any role in historic tribal hunting and fishing practices. There is no mention of any right to take leeches in any treaty. Therefore, the establishment of a special right for Indians to take leeches is absolutely devoid of any support. Indians only began trapping leeches when recent non-Indian use created a demand. Thus, the government's policy of preferring Indians over all other races, basing this preference on "historical treaty rights" is great historical legerdemain, but nevertheless constitutionally

incorrect. The fact that other non-member Indians share this preference underscores the point. This exemption from laws created for Indians violates the equal protection of the laws.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Dated June 18, 1990.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 88-5357

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD RICHARD AANERUD, PAUL VINCENT MORINVILLE, and RHONDA RAE MORINVILLE,

Appellants.

Submitted: June 13, 1989

Filed: January 11, 1990

Before JOHN R. GIBSON, Circuit Judge, BROWN,* Senior Circuit Judge, and WOLLMAN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

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*The HONORABLE JOHN R. BROWN, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

Ronald Richard Aanerud, Paul Vincent Morinville, and Rhonda Rae Morinville appeal their convictions for trapping leeches without special permits in violation of 18 U.S.C. § 2 (1982) and 50 C.F.R. § 27.51 (1988). Before the district court,[1] appellants argued that the charges against them should be dismissed because the government's enforcement policy violated their constitutional rights under the equal protection clause of the fifth amendment in two ways: (1) the government's prosecution of them constituted selective enforcement of the laws; and (2) the government allowed Native Americans to take leeches. The court denied their motions to dismiss.

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[1]The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota.

Appellants then entered a conditional plea of guilty under Rule 11(a) of the Federal Rules of Criminal Procedure, thereby reserving their rights to appeal the court's denial of their constitutional claims. These appeals followed. For the reasons set out below, we affirm the district court.

On May 29, 1987, Aanerud, his daughter, Rhonda Morinville, and her husband, Paul Morinville, were apprehended by the United States Fish and Wildlife Service (Wildlife Service) while trapping leeches[2] in the Krebsbach and Borgrund Waterfowl Production Areas in Mahnomen County, Minnesota. The trio was subsequently charged with violating

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[2]The controversy in this case centers around the leech trapping. Leeches are normally used as fishing bait, and are commonly trapped and sold to fishermen.

18 U.S.C. § 2[3] and 50 C.F.R. § 27.51.[4] The trapping occurred on land owned by the federal government and within the confines of the White Earth Indian Reservation. The appellants admittedly staged the event in order to provide a test case to challenge the legality of leech trapping by Native

---

[3]This statute provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

[4]This regulation states:

§ 27.51. Disturbing, injuring, and damaging plants and animals.

(a) Disturbing, injuring, spearing, poisoning, destroying, collecting or attempting to disturb, injure spear, poison, destroy or collect any plant or animal on any national wildlife

Americans under historic treaty rights.

The White Earth Reservation was created by an 1867 treaty between the United States and the Chippewa Indians. Treaty with the Chippewa Indians, 16 Stat. 719 (March 19, 1867) (Treaty of 1867). It is well-settled that the Treaty of 1867, even though it relates specifically to agricultural pursuits and makes no express reference to hunting and fishing rights, reestablished the Minnesota Chippewa's aboriginal rights of hunting, fishing, and collecting rice, which had been extinguished by the Treaty of February 25, 1855, 10 Stat. 1165 (February 25, 1855). See White Earth Band of Chippewa

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refuge is prohibited except by special permit unless otherwise permitted under this Subchapter C.

50 C.F.R. § 27.51

Indians v. Alexander, 518 F.Supp. 527, 534 (D. Minn. 1981) ("[t]hese are aboriginal rights relinquished by the Treaty of 1855, but later reacquired by the Treaties of 1864 and 1867"), aff'd, 683 F.2d 1129, 1137 (8th Cir. 1982) (White Earth II) ("[t]he [White Earth] Band's right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty"); State v. Clark, 282 N.W.2d 902, 909 (Minn. 1979) (members of the White Earth Band had hunting and fishing rights under treaty within the White Earth Reservation); State v. Forge, 262 N.W.2d 341, 345 (Minn. 1977) (en banc) ("[u]nder these treaties [Treaty of 1855 and Treaty of 1867] the [Leech Lake] Band retained an unextinguished right to hunt and fish [on the Leech Lake Reservation]").

In this case, appellants couch their arguments in terms of differential

treatment of non-Indians and Indians. The issue before us, however, involves the distinction between members of the White Earth Band of the Minnesota Chippewa (White Earth Band) and non-members. Non-members include non-Native Americans, as well as Native Americans not affiliated with the White Earth Band.[5]

I.

At the time of their apprehension, appellants were properly licensed to commercially trap leeches under Minnesota law.[6] These licenses were

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[5] In White Earth II we stated that "Indians who are not members of the [White Earth] Band are treated as non-Indians with regard to hunting and fishing, and wild rice gathering on the [White Earth] Reservation." 683 F.2d at 1132 n.3 (citing Washington v. Confederated Tribes of Colville, 447 U.S. 134, 161 (1980)).

[6] Aanerud had a Minnow Dealer's License, a Minnow Helper License, and a Minnow Dealer's Vehicle License. For

conditioned upon complying with local ordinance and zoning laws. Appellants were charged with taking leeches in a Waterfowl Production Area. The Wildlife Service prohibits such trapping, without a special permit, because it is not compatible with waterfowl production goals.[7] This prohibition, however, has one exception: it does not apply to Native Americans in Waterfowl Production Areas located within the confines of

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purposes of our review, we assume that Aanerud and his party were properly licensed to trap leeches under Minnesota law.

[7] In a letter dated December 22, 1986, cited by both parties in this case, Rollin F. Siegfried, Division Supervisor, United States Fish and Wildlife Service, states that:

> Wetland managers feel that leech trapping is not compatible with waterfowl production goals because it disturbs nesting waterfowl and their broods, reduces populations of invertebrates consumed by waterfowl, and attracts and concentrates predators which are drawn to discarded bait and nontarget catches.

appropriate reservations. The United States Attorney, in argument, states that this exception was created by an executive branch decision which was based on the Chippewa's historic treaty rights.

On February 15, 1988, before the district court, the appellants moved for a dismissal of the charges against them. They argued that the Wildlife Service violated the equal protection clause of the fifth amendment by allowing only Indians to trap in the area without a permit. Appellants contended that the Wildlife Service granted Indians special permits to take leeches in the area in

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Letter to Mr. Merle DeBoer from Rollin F. Siegfried, Division Supervisor, United States Fish and Wildlife Service, regarding Wildlife Service's policy concerning leech trapping in Waterfowl Production Areas, Appellee's Brief, Addendum II.

question, and that no such permits were issued to non-Indians. Further, they maintained that Indians who were required to have, and were eligible to receive, these special permits were not prosecuted for taking leeches without permits. Because these Indians were not prosecuted for taking leeches without permits, but non-Indians were, appellants argued that they were victims of selective prosecution and also contended that they were deprived of equal protection because the special preference given to Indians on this matter had no support in the law.

The district court accepted the government's argument that Native Americans enjoy certain rights not granted to non-Native Americans. In denying appellants' motions to dismiss, the court held that the right to trap leeches without a special permit arose

from the aboriginal rights to hunt and fish established by the Treaty of 1867, which has never been extinguished by Congress. The appellants then entered conditional guilty pleas, reserving the right to appeal, under Rule 11 (a) of Federal Rules of Criminal Procedure, the denial of their motion to dismiss. Appellants were fined and given suspended prison sentences, conditioned on not violating leeching laws for one year.

II.

The sole issue before this court is whether the Chippewa's treaty rights to hunt, fish, and gather wild rice provide a legitimate basis for distinguishing between trapping leeches by members of the White Earth Band and non-members within the White Earth Reservation.

Appellants contend that these treaty rights do not afford such a legitimate

basis. They argue that their equal protection rights have been violated by the present Wildlife Service policy in two ways. They argue first that the charges against them should be dismissed because the Wildlife Service's enforcement policy constitutes selective prosecution, and, next, that the Wildlife Service's policy of treating the Band members differently is improper, in that it is not linked to Congress' obligation to Native Americans. These equal protection arguments overlap considerably. Regardless, we will consider appellants' arguments in turn.

A.

Appellants first contend that permitting Indians to take leeches without permits, while prosecuting non-Indians, constitutes selective criminal prosecution in violation of the

fifth amendment's guarantee of equal protection. Appellants maintain that this selective prosecution serves as an effective defense to the charges filed against them. To establish a selective prosecutive defense the appellants must establish two elements. First, they must show that they were singled out for prosecution while similarly situated individuals have not been prosecuted for similar conduct. United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978). They also must show that the government's discriminatory selection is based on an impermissible ground such as race, religion, or the exercise of constitutional rights. Id. See United States v. Hintzman, 806 F.2d 840, 842 (8th Cir. 1986); United States v. Holmes, 794 F.2d 345, 347 (8th Cir. 1986). The district court held that the appellants had failed to establish

either of these requisite elements. Based on our review of the record, we agree with the district court.

First, members of the White Earth Band and non-members are simply not similarly situated with regard to their respective rights to trap leeches within the confines of the Reservation. The Treaty of 1867 has been held to have reestablished the aboriginal rights of members of the White Earth Band to hunt, fish and gather rice within the confines of the White Earth Reservation. See White Earth II, 683 F.2d at 1137; Forge, 262 N.W.2d at 345; Clark, 282 N.W.2d at 909. Although trapping leeches has only become prevalent in the last fifteen years, the Band's right to trap leeches has been recognized by the Wildlife Service. Letter from John Popowski, Acting Regional Director, United States Department of the Interior, Fish and

Wildlife Service, to the Honorable Dave Durenberger, United States Senator, August 26, 1987, Appellants' Brief, Addendum 3. These treaty rights remain indefinitely valid, unless they are specifically abrogated. United States v. Dion, 476 U.S. 734, 738 (1986). And since these rights have not been abrogated by Congress, the first element required for a selective prosecution defense has not been established.

Since there is no discrimination by the government, we need not address the second element. We do note, however, that any differentiation that occurred was not based on an impermissible ground. Clearly, the members of the White Earth Band are treated differently than non-members, but this differentiation is based on geography and rights under the Treaty of 1867, not a race. A Band member caught trapping

leeches in a Waterfowl Production Area outside the Reservation, and thus not under the aegis of the Treaty of 1867, would be subject to the same penalties as the appellants in this case. Geography is not generally considered an impermissible ground. See, e.g., Catlett, 584 F.2d at 866. Furthermore, under White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), it is permissible on reservations to treat Native Americans and non-Native Americans differently due to Native Americans' special status under the law. Id. at 142.

Alternatively, appellants argue that the district court erred in denying discovery and an evidentiary hearing to establish their argument for a selective prosecution defense, citing United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976). While we held the

evidence in Cammisano to be sufficient to merit a discovery order, we also stated that "mere allegations of selective prosecution do not authorize a defendant to engage in a fishing expedition." Id. In United States v. Jacob, 781 F.2d 643 (8th Cir. 1986), we set out in greater detail what must be established to merit further discovery or an evidentiary hearing. "The defendant must first make a preliminary or threshold showing of the essential elements of the selective prosecution defense." Id. at 646. See Catlett, 584 F.2d at 866 ("A hearing is necessitated only when the motion alleges sufficient facts to take the question past the frivolous state, and raises a reasonable doubt as to the prosecutor's purpose" (citations omitted)). In this case, appellants failed to make a threshold showing of either of the elements

necessary for a selective prosecution defense. Therefore, the district court did not err in its failure to grant an evidentiary hearing or discovery.

Appellants also argue that the district court erred by failing to address their argument that the Chippewa were required to have permits under Wildlife Service rules, but were not prosecuted for failing to meet this requirement. Appellants contend that, even if the White Earth Band has a treaty right to take leeches, they are still required to secure permits. To support their position appellants cite two documents stating that Native Americans are supplied permits under historic treaty rights. One document is a letter from Rollin F. Siegfried discussing the Wildlife Services exception to the Chippewa relating specifically to the Detroit Lakes area

is not within the White Earth Reservation and that the appellants were not trapping leeches on the Tamarac Reservation. Further, we note that the argument that the Chippewa were requited to have permits under Wildlife Service rules, which may run contrary to their treaty rights, can give no comfort to appellants.

B.

Appellants' second argument is also based on the guarantee of equal protection under the laws provided by the fifth amendment. They argue that the Wildlife Service enforcement policy violates the equal protection clause because the different treatment given Native Americans cannot be tied to "the fulfillment of Congress' unique obligation toward the Indians." Morton v. Mancari, 417 U.S. 535,555 (1974). The district court did not specifically

address this argument in its opinion because of its close ties to the selective prosecution argument.

In Mancari the Supreme Court recognized that:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Id. at 552. See Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 480 (1976). Accordingly, "[i]t is in this historical and legal context that the constitutional validity of the Indian preference is to be determined." Mancari, 417 U.S. at 553.

As stated previously, it is well

established that the White Earth Band has aboriginal rights to hunt, fish, and gather wild rice on the White Earth Reservation. See White Earth II, 683 F.2d at 1137; Forge, 262 N.W.2d at 345; Clark, 282 N.W.2d at 909. Furthermore, despite the fact that trapping leeches is a rather recent development on the reservation, we are satisfied that it fits firmly within the ambit of the Band's aboriginal rights, a position supported by the Wildlife Service. Therefore, we are satisfied that since the Band's right to take leeches is sufficiently tied to "the fulfillment of Congress' unique obligation toward the Indians," the Wildlife Service's enforcement policy does not run awry of the equal protection clause. Mancari, 417 U.S. at 555.

Finally, we note that even in the absence of treaty rights, the Supreme

Court has upheld singling out Native Americans for special treatment. See Mancari, 417 U.S. at 547-48; McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 165 (1973). This special treatment for Native Americans, which we have also discussed above in the context of the selective prosecution arguments, fully answers the equal protection arguments asserted by appellants.

Therefore, appellant's second argument also fails. We further observe that a prosecution of criminal charges, even in an event that is staged, is less than a satisfactory vehicle for raising equal protection claims. We say not more, leaving to counsel the task of developing a more desirable method for asserting these claims.

III.

For the above mentioned reasons, we

affirm the district court's denial of appellants' motions to dismiss.

JOHN R. BROWN, Circuit Judge, Concurring.

I concur fully in Judge Gibson's opinion for us. Without disagreeing with the opinion statement that "prosecution of criminal charges . . . is less that a . . . vehicle for raising equal protection claims thus leaving to counsel [to develop] a method for asserting these claims", I would add these brief comments.

On the challenge of selective prosecution, certain factors bear emphasis. First, the prosecution was not out of the blue. Indeed, it was purposefully sought for the now jurisprudentially established legitimate objective of frank civil disobedience as a means of challenging the

constitutionality of a given statute, rule, regulation, or practice.

When one seeks the very prosecution which materializes it would be incongruous to hold that the government, responding in effect to such importunities, has committed some kind of constitutional violation in serving up the mechanism so deliberately sought.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-5357MN

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD RICHARD AANERUD, et al.,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

Appellant's petition for rehearing has been considered by the Court and is denied.

February 16, 1990

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

3-87 CR 123 (1)

3-87 CR 123 (2)

3-87 CR 123 (3)

UNITED STATES OF AMERICA,

Plaintiff,

v. ORDER

RONALD RICHARD AANERUD,

PAUL VINCENT MORINVILLE,

and RHONDA RAE MORINVILLE,

Defendants.

This matter comes before the court on defendants' motion to dismiss the misdemeanor charges. The defendants are charged with violation of 18 U.S.C. § 2 and 50 C.F.R. § 27.51, for trapping leeches without a special permit. The

defendants have plead not guilty and are now seeking to dismiss the proceedings against them. Fed. R. Crim. P. 12.

I. BACKGROUND.

On May 29, 1987, the defendants took leeches from within the Kresbach and Borgrund Waterfowl Production Areas in Mahnomen County, Minnesota. These lands are federal lands owned by the United States and are considered part of the White Earth Indian Reservation. Defendants derive income from the sale of leeches and at the time of the violation, one or more of the defendants possessed appropriate Minnesota commercial licenses, but did not possess the appropriate permits to trap leeches on reservation land. The defendants' main assertion is that Native Americans are permitted to take leeches at the same location while non-Native Americans

are not thus, a violation of the equal protection clause.

The plaintiff contends that the notion to dismiss is not well taken because on reservation land, Native Americans may be treated differently than non-Native Americans and due to treaty rights Native Americans have different rights than non-Native Americans.

II. DISCUSSION.

In order for an equal protection claim to survive, it must pass a two-tiered test. First, the defendant must be shown to have been singled out for prosecution while other similarly situated individuals have not been prosecuted for similar conduct. Secondly, there must be a showing that the government's discriminatory selection is based on an impermissible ground such as race, religion, or

exercise of first amendment rights. United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978).

It is commonly known that because of the existence of treaty rights, Native Americans enjoy certain rights not exercisable by non-Native Americans. The White Earth Band of Chippewa Indians have aboriginal rights to hunt and fish as established by the Treaty of 1867 and such rights were thereafter never extinguished. State of Minnesota v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980); White Earth Band of Chippewa Indians v. Alexander, 518 F.Supp. 527 (Minn. 1987), aff'd, 683 F.2d 1129 (8th Cir. 1982), cert. denied, 459 U.S. 1070 (1982). In addition, tribal members may exercise their rights to hunt and fish free of state regulations on all reservation

lands. Id.

The defendants' sole argument in favor of dismissal is violation of the equal protection clause of the United States Constitution. It is perfectly acceptable that Native Americans and non-Native Americans are treated differently due to the Native American's special status. White Mountain Apache Tribe v. Bracker, 488 U.S. 136, 142 (1980). Regardless of the fact that leech trapping is a fairly recent phenomena and that there is no mention of a specific treaty right to trap leeches, the United States Fish and Wildlife Service can and has recognized the activity of leech trapping as a part of the treaty rights held by the White Earth Band. Until Congress has explicitly abrogated a particular treaty right, such rights continue. See United

States v. Dion, 476 U.S. 734 (1986). There has been no such specific abrogation of the gathering of leeches, which is well within the right to hunt, fish, gather and trap.

The defendants have failed to meet either prong. Primarily, Native Americans are not similarly situated, under the first prong because of their unique status. Secondly, the "discrimination" involved simply is not based on an impressible ground. Rather, treating Native Americans differently because of treaty rights, among other things, is a permissible ground for not requiring a permit to trap leeches while requiring that same permit for non-Native Americans.

Based on the foregoing discussion and the memoranda filed with the court,

IT IS ORDERED that defendants' motion

to dismiss be, and the same hereby is, denied.

Dated April 12, 1988.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Criminal No. 3-87-123 (1) (2) (3)

UNITED STATES OF AMERICA,

Plaintiff,

v.

RONALD RICHARD AANERUD,

PAUL VINCENT MORINVILLE, and

RHONDA RAE MORINVILLE,

Defendants.

STIPULATION RELATIVE TO

ENTRY OF GUILTY PLEA

WHEREAS, the defendants previous hereto moved for dismissal of the charges against them; and

WHEREAS, the Court, by Order dated April 12, 1988 denied defendants motion for dismissal; and

WHEREAS, defendants, subsequent to entry of their plea of guilty herein, intend to appeal the Order dated April 12, 1988 denying dismissal of the charges; and

WHEREAS, defendants wish to reserve in writing the right to review the adverse determination of the Court's denial of its motion to dismiss:

NOW, THEREFORE, plaintiff and defendants, through their respective attorneys, do agree as follows:

1. Plaintiff, through its undersigned attorney, does consent to defendant's entry of a conditional plea of guilty pursuant to Rule 11(a) of the Rules of Criminal Federal Procedure and recognizes and acknowledges defendants' intent to appeal from the judgment to review the adverse determination to the defendants of this Court's Order of

April 12, 1988 wherein the Court denied defendants' motion for dismissal.

Dated August 10, 1988.

UNITED STATES OF AMERICA

By /s/Thorwald H. Anderson, Jr.
Thorwald H. Anderson, Jr.
Assistant United States Attorney

SMITH, PERSIAN, MacGREGOR & THOMPSON

By /s/Malcolm D. MacGregor
Malcolm D. MacGregor
Attorney for Defendants
1115 Second Avenue South
Minneapolis, Minnesota 55403
Telephone: 612-339-6733

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-5357MN

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD RICHARD AANERUD, et al.,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

Appellant's objection to the no-argument classification has been considered by the Court and is overruled. This case will remain on the no-argument docket and counsel will be notified when an opinion is issued.

March 21, 1989

Order Entered at the Direction of the Court

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-5357MN

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD RICHARD AANERUD, et al.,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

After further consideration of the Court, appellant's objection to no argument disposition is sustained.

March 24, 1989

Order Entered at the Direction of the Court

/s/ Robert St. Vrain

Clerk, U.S. Court of Appeals for the Eighth Circuit

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 88-5357MN

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD RICHARD AANERUD, PAUL VINCENT MORINVILLE, and RHONDA RAE MORINVILLE,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 11, 1990

ATTEST: /s/Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT
MANDATE ISSUED: 2/23/90

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 88-5357MN

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD RICHARD AANERUD, PAUL VINCENT MORINVILLE, and RHONDA RAE MORINVILLE,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

Appellant's motion for modification of the opinion filed January 11, 1990 has been considered by the court and is denied.

April 4, 1990

Order entered at the direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-780

RONALD RICHARD AANERUD, PAUL VINCENT MORINVILLE AND RHONDA RAE MORINVILLE,

Petitioners,

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 18, 1990.

/s/ Harry A. Blackmun
Associate Justice of the
Supreme Court of the
United States

Dated this 8th day of May, 1990.